

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT 24 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ROBERT JONES,)	2 CA-CV 2011-0015
)	DEPARTMENT B
Plaintiff/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
FIRST AMERICAN TITLE INSURANCE)	Appellate Procedure
CO., Trustee under Trust 8344 and/or)	
Trust 8584,)	
)	
Defendant/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV08572

Honorable James A. Soto, Judge

APPEAL DISMISSED

Robert Jones

Sierra Vista
In Propria Persona

Burch & Cracchiolo, P.A.
By Andrew Abraham, R. Aaron Edens,
and Jessica Conaway

Phoenix
Attorneys for Defendant/Appellee

K E L L Y, Judge.

¶1 Appellant Robert Jones appeals from the trial court's January 19, 2011, order entering judgment in favor of appellee First American Title Insurance Company

(“First American”) and against Jones on his counterclaim.¹ For the reasons below, we dismiss the appeal for lack of jurisdiction.

Background

¶2 Jones filed a complaint against First American seeking to quiet title to real property and to establish easement rights. First American filed an answer and counterclaim in which it also sought to quiet title to the disputed property. Following a bench trial, the trial court ruled against Jones on his complaint and in favor of First American on its counterclaim and awarded it attorney fees. Jones immediately appealed that ruling and the trial court thereafter granted Jones’s motion objecting to the fee award and entered its judgment.

Jurisdiction

¶3 Although neither party has raised the issue, we have an independent duty to determine whether we have jurisdiction over an appeal. *See Robinson v. Kay*, 225 Ariz. 191, ¶ 4, 236 P.3d 418, 419 (App. 2010). “[T]he right to appeal exists only by force of statute.” *Grand v. Nacchio*, 214 Ariz. 9, ¶ 12, 147 P.3d 763, 769 (App. 2006), *quoting Cordova v. City of Tucson*, 15 Ariz. App. 469, 470, 489 P.2d 727, 728 (1971). “Section 12-2101, A.R.S., governs our appellate jurisdiction.” *Id.* If the order appealed from is not among the kinds of orders the statute specifies, we lack jurisdiction over the appeal and must dismiss it. *Kemble v. Porter*, 88 Ariz. 417, 418-19, 357 P.2d 155, 156 (1960). An order is final and appealable under § 12-2101(B) if it “decides and disposes of the

¹Jones’s co-plaintiff in the underlying action is not a party on appeal and we therefore refer only to Jones.

cause on its merits, leaving no question open for judicial determination.”” *Props. Inv. Enters., Ltd. v. Found. for Airborne Relief, Inc.*, 115 Ariz. 52, 54, 563 P.2d 307, 309 (App. 1977), *quoting Decker v. City of Tucson*, 4 Ariz. App. 270, 272, 419 P.2d 400, 402 (1966).

¶4 Here, Jones filed his notice of appeal on January 21, 2011, challenging the trial court’s January 19, 2011, order entering judgment in favor of First American. In that order, the court concluded that First American was “entitled to its reasonable attorney’s fees,” but it did not determine the amount of the award. Thereafter, First American submitted an affidavit in support of its request for fees. Jones filed a response in which he argued an award of fees was not appropriate. On May 4, 2011, after considering the motions, the court declined to award First American its attorney fees concluding that “[n]otwithstanding [its] previous order,” “an award of attorney’s fees would cause an extreme hardship to [Jones].” That same day, in a separate signed order, the court entered judgment in favor of First American.

¶5 Because the January 19 order did not resolve the issue of attorney fees, it did not adjudicate the rights of all parties to the lawsuit and therefore was not a final, appealable judgment. *See* Ariz. R. Civ. P. 58(g) (“[J]udgment shall not be entered until claims for attorneys’ fees have been resolved and are addressed in the judgment.”). In some circumstances, ““a claim for attorneys’ fees may be considered a separate claim from the related judgment regarding the merits of a cause.”” *Britt v. Steffen*, 220 Ariz. 265, ¶ 18, 205 P.3d 357, 361 (App. 2008), *quoting* Ariz. R. Civ. P. 54(b). In such a case, pursuant to Rule 54(b), a trial court may “direct the entry of final judgment as to one or

more but fewer than all of the claims . . . upon an express determination that there is no just reason for delay and . . . an express direction for the entry of judgment.” But, the trial court here did not include Rule 54(b) language in its January 19 ruling. We therefore have no authority to review it as a separate, appealable order. *See Kinnear v. Finegan*, 138 Ariz. 34, 35-36, 672 P.2d 986, 987-88 (App. 1983) (judgment that did not dispose of all issues and did not include Rule 54(b) language not appealable); *see also* § 12-2101; Ariz. R. Civ. P. 54(b).

¶6 Finally, this is not a situation in which the exception to the final judgment rule, first recognized by our supreme court in *Barrassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981), applies. That limited exception “allows a notice of appeal to be filed after the trial court has made its final decision, but before it has entered a formal judgment, if no decision of the court could change and the only remaining task is merely ministerial.” *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, ¶ 37, 132 P.3d 1187, 1195 (2006). Here, because the amount of attorney fees had not been decided, more than ministerial tasks remained following the January 19 ruling. Indeed, after considering the parties’ motions, the court declined to award attorney fees notwithstanding its earlier ruling that First American was entitled to such fees. Therefore, Jones’s notice of appeal is a nullity and we lack jurisdiction. *See Craig v. Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d 624, 626 (2011) (reaffirming limited nature of *Barrassi* exception and holding that “[i]n *all* other cases, a notice of appeal filed in the absence of a final judgment . . . is . . . a nullity”).

¶7 First American requests an award of attorney fees and costs on appeal pursuant to A.R.S. § 12-1103(B). *See Mariposa Dev. Co. v. Stoddard*, 147 Ariz. 561, 565, 711 P.2d 1234, 1238 (App. 1985) (attorney fees may be awarded on appeal in quiet title action). In our discretion, we decline its request for attorney fees. *See Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 195, 840 P.2d 1051, 1060 (App. 1992) (award of fees discretionary). However, because it is the prevailing party, we award First American its costs upon its compliance with Rule 21, Ariz. R. Civ. App. P. *See In re Perez*, 71 Ariz. 352, 353, 227 P.2d 385, 385 (1951) (prevailing party entitled to costs when appeal dismissed).

Disposition

¶8 For the foregoing reasons, we dismiss the appeal.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge